STATE OF MICHIGAN

IN THE SUPREME COURT

ARTHUR Y. LISS & BEVERLY LISS,

Plaintiffs-Appellees,

-vs-

LEWISTON-RICHARDS, INC. &
JASON P. LEWISTON,

Defendants-Appellants,
_____/

Supreme Court No. 130064

Court of Appeals No. 266326

Oakland County Circuit Court
No. 03-046587-CK

BRIEF OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL

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STATEMENT OF THE BASIS OF JURISDICTION

On May 4, 2006, this Court granted Appellants' application for bypass appeal. It has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTION INVOLVED

ARE CLAIMS AGAINST A LICENSED BUILDER ARISING OUT OF THE CONSTRUCTION AND SALE OF A RESIDENTIAL DWELLING EXCLUDED FROM COVERAGE UNDER THE MICHIGAN CONSUMER PROTECTION ACT BECAUSE THE COMPLAINED-OF CONDUCT OR TRANSACTION FALLS WITHIN THE BUSINESS EXEMPTION AS INTERPRETED BY *SMITH v GLOBE LIFE INSURANCE*?

Plaintiffs-Appellees Arthur and Beverly Liss answer "No."

Defendants-Appellants Lewiston Richards, Inc., and Jason Lewiston answer "Yes."

Amicus Curiae Michigan Defense Trial Counsel answers "Yes."

The Oakland County Circuit Court answered "No."

The Court of Appeals did not answer the question because this is a bypass appeal.

STATEMENT OF FACTS

The Michigan Defense Trial Counsel (MDTC) relies upon the statement of facts set forth in Defendants-Appellants Lewiston-Richards, Inc., and Jason P. Lewiston's brief.

ARGUMENT

CLAIMS AGAINST A LICENSED BUILDER ARISING OUT OF THE CONSTRUCTION AND SALE OF A RESIDENTIAL DWELLING ARE EXCLUDED FROM COVERAGE UNDER THE MICHIGAN CONSUMER PROTECTION ACT BECAUSE THE COMPLAINED-OF CONDUCT OR TRANSACTION FALLS WITHIN THE BUSINESS EXEMPTION AS INTERPRETED BY *SMITH v GLOBE LIFE INSURANCE.*

The Michigan Court of Appeals has applied the Michigan Consumer Protection Act to permit claims against licensed residential builders despite an exemption created by the Legislature for conduct or transactions "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority" of the state. See e.g., *Hartman & Eichhorn Building Co, Inc v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005); *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000). These decisions cannot be conciled with the statutory text, are based upon a misreading of past precedent, and require a reversal by this Court.

A. LICENSED BUILDERS ARE NORMALLY EXEMPT FROM CLAIMS ARISING OUT OF THE CONSTRUCTION AND SALE OF RESIDENTIAL DWELLINGS BECAUSE THE CLAIMS ARE ORDINARILY BASED ON TRANSACTIONS AND CONDUCT SPECIFICALLY AUTHORIZED BY THE MICHIGAN OCCUPATIONAL CODE.

The Michigan Consumer Protection Act regulates a string of acts, methods, and practices engaged in the conduct of trade or commerce. MCL 445.903. But the statute exempts:

> [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. MCL 445.904(1)(a); MSA 19.419(4)(1)(a).

MCL 445.904(1)(a). MDTC contends that this exemption excludes most potential claims involving residential dwellings from coverage because they are ordinarily brought against licensed builders whose conduct is regulated under the Michigan Occupational Code.

This Court has faithfully interpreted statutes to effectuate the legislative intent as embodied in the statutory text. *Robinson v Detroit*, 462 Mich 439, 318; 459 NW2d 307 (2000). Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Robinson*, 462 Mich at 318, citing *University of Michigan Board of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). In *Robinson*, this Court reiterated the principle that it could "not assume that the Legislature inadvertently made use of one word or phrase instead of another." 462 Mich at 318, citing *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). It also emphasized that the clear language of a statute must be followed. *City of Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959). See also, *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002) ("duty is to apply the language of the statute as enacted, without addition, subtraction, or modification"). 466 Mich at 101 citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999).

MCL 445.904(1)(a) creates an exemption for a "transaction or conduct specifically authorized under laws administered by a regulatory board ... acting under statutory authority of this state...." First, claims brought against licensed residential builders are typically based on a transaction, a contract for building a residence or performing some construction on a residence, which is governed by the Michigan Occupational Code. MCL 339.101 *et seq*. Second, such claims are ordinarily based on conduct (the building or construction) that is regulated by the Code. *Id.*

The claims advanced by the plaintiffs in this case exemplify the claims normally brought against licensed builders and illustrate why they fall within the exemption. The Lisses and the Daileys complain about conduct or transactions allegedly engaged in by licensed builders of

residential homes that were part of the construction, maintenance, or alteration of a residential building. The Lisses, for example, complain that construction was not completed on time, that the licensed residential builder made representations about its experience that were untrue, and that the construction was defective and not completed in a workmanlike manner "consistent with the standards of the industry." (Second Amended Complaint, ¶¶ 8-22, Apx 54a). The Lisses also complain that the licensed residential builder failed to pay subcontractors, laborers, and materialmen as obligated to do. (*Id.* at ¶¶ 41-45, Apx 59a-60a).

The Lisses' claims are based upon conduct or transactions that are specifically authorized under laws administered by a regulatory board, which is located within the Department of Labor and Economic Growth, formerly known as the Department of Consumer and Industry Services. MCL 339.2402; MCL 339.307(1). Residential builders are persons

> engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property.

MCL 339.2401(a). The board is empowered to issue, suspend, revoke, or deny licenses to those seeking to engage in residential building activities. MCL 339.2402-339.2410. Article 24 of the Michigan Occupational Code establishes a comprehensive enforcement scheme by a regulatory board, which allows complaints to be filed, hearings held, and relief provided in appropriate cases. MCL 339.2411-339.2412. The Michigan Occupational Code, MCL 339.101 *et seq.* governs the conduct of licensed builders of residential homes and the transactions into which

they enter as part of residential building construction. The Code explicitly addresses workmanship of the builder, and requires that buildings meet the standards of the custom or trade as verified by a building-code enforcement official. MCL 339.2311(2). The Code also prohibits fraud, deceit, dishonesty, and falsity, and creates an enforcement scheme for addressing violations and for resolving customer complaints. MCL 339.307-339.317.

In *Smith v Globe Life Ins*, 460 Mich 446; 597 NW2d 28 (1999), the Court interpreted MCL 445.904(1)(a) to exempt claims under the Michigan Consumer Protection Act, which are based on a transaction or conduct when the general conduct or transaction is authorized by law. *Id.* at 465. According to *Smith*:

> [T]he relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Smith, supra, at 465. In so holding, this Court, in accordance with *Robinson*, focused on the exact statutory language of the exemption, refusing to insert additional language into it.

Nothing in the text suggests that the analysis should focus on the specific conduct or transaction. This adjective "specific" does not modify "conduct" and "transaction"; its placement in the sentence suggests that it modifies "authorized." In effect, those arguing that the Act governs claims against residential builders are asking this Court to alter the plain language of the exemption by inserting the word "specific" between "a" and "transaction." The question is whether a "transaction" or "conduct" has been specifically authorized by law. Those urging that the residential builders are governed by the Act insist that no statute authorizes the misrepresentation or failure to construct the buildings in a workmanlike manner, or other similar allegations of wrongdoing. They insist that the Legislature sought to avoid "put[ting] the merchant on the horns of a dilemma with the same transaction or conduct being specifically authorized by one statute potentially being a violation of the MPCA." (See e.g., Brief of Amicus

Curiae by State Bar of Michigan Consumer Law Section Council, et al, p 5). Their argument assumes that other statutes regulating conduct also regulated in the Consumer Protection Act conflict with its provisions. Reading the exemption in this way contradicts these accepted rules of interpretation because it suggests that the Legislature enacted conflicting statutes. Under this reading, the Legislature's purpose in enacting the provision was merely to ensure that earlier conflicting statutes were not impliedly repealed.

Smith's interpretation of the Exemption as focusing on whether the general conduct is specifically authorized is further supported by current case law interpreting statutory language based on established grammatical principles. In the recently decided case *Paige v City of Sterling Heights*, __ NW2d __, 2006 WL 2129832 (Mich, 2006), this Court was asked to determine the proper meaning of the phrase "the proximate cause," as contrasted with "a proximate cause," the former being found in the Worker's Disability Compensation Act ("WDCA), MCL 418.101, *et seq*. *Id.* at 1. In so ruling that "the proximate cause" contemplated but one sole proximate cause, this Court appreciated the significant difference between "a" and "the":

> Traditionally to our law, to say nothing of classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of the indefinite article a or an)..." Random House Webster's College Dictionary, p. 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "all words and phrases shall be construed and understood according to the common and approved usage of the language..." MCL 8.3(a); MSA 2.212(1). Moreover, there is no indication that the words "the" and "a" in common usage meant something different at the time this [Worker's Disability Compensation] statue was enacted... (emphasis added).

Id. at 4. Adopting this analysis, this Court determined that the phrase "the proximate cause," as used in MCL 418.375(2) of the WDCA referred to the sole proximate cause. *Id.* at 5.

This "a" versus "the" analysis is applicable to the Michigan Consumer Protection Act exemption and provides further support for this Court's decision in *Smith*. The exemption uses the indefinite article "a" : [t]his act does not apply to...a transaction or conduct..." MCL 445 904(1)(a). Following the indefinite article "a" is the noun "transaction." *Id.* Therefore, as recognized in *Paige*, the indefinite article "a" in the statutory language of the exemption refers to a generic force, i.e. a generic transaction or generic conduct. *Paige, supra* at 5. This is consistent with *Smith*'s focus on whether the general transaction or general conduct is specifically authorized, not whether the specific alleged misconduct is authorized.

Acceptance of the plaintiffs narrow reading of the exemption, requires this Court to ignore the precedent set forth in *Paige* and interpret the indefinite article "a" in the statute as a definite article "the." Such a reading cannot be reconciled with this Court's holding in *Paige* and is contrary to accepted grammatical principles. Such a stark departure from precedent ought not be tolerated.

As a rule of statutory construction, statutes that relate to the same subject or that share a common purpose are in pari materia and must be read together as one. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Indeed, the Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *People v Ventura*, 262 Mich App 370, 376; 686 NW2d 748 (2004). The purpose of the "in pari materia" rule is to effectuate the purpose of the Legislature as evinced by the harmonious statutes on a subject. *Webb, supra*. Therefore, if a court can construe the statutes so that they do not conflict, that construction should control. *Id.*

A more natural reading of the provision is that the Legislature sought to avoid immersing those whose conduct and transactions are already governed by a regulatory board within the executive branch to litigation under the Michigan Consumer Protection Act. The Legislature

presumably did so to avoid the possibility of different results, the needless tension that this might cause between the executive branch and the judiciary, and the wasted resources endemic in proceedings in both a regulatory and judicial forum. Article 24 of the Occupational Code establishes a comprehensive regulatory scheme that governs licensed residential builders. This regulatory scheme is administered by a board of residential builders and maintenance and the State of Michigan Department of Consumer and Industry Services. It governs numerous aspects of conduct or transactions relating to residential building. MCL 445.309. Given the comprehensive nature of this regulatory scheme, those complaining of problems with licensed residential builders have a remedy by filing a complaint with the regulatory entity that governs this occupation. As a result, MCL 445.904(1)(a) exempts the conduct or transaction from further regulation by the Michigan Consumer Protection Act.

This Court's holding in *Smith* is consistent with the law of other jurisdictions. Many states, including Georgia, Idaho, Illinois, Maine, Nebraska, New Hampshire, and Rhode Island, have taken a liberal approach to substantially similar statutory provisions in their respective consumer protection statutes.[1] For example, Rhode Island's corollary to the Michigan Consumer

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[1]In *Hartman v Dailey* (a companion case coming before this Court), Appellant R. Hartman's Reply Brief on Appeal set forth a list of cases concurring in *Smith*'s interpretation:

> See, *Ferguson v United Ins Co of America*, 163 Ga App 282; 293 SE2d 736, 737 (1982) (suit by beneficiary to recover life insurance proceeds barred by specific authorization and regulation of insurance under Georgia's insurance code); *First of Maine Commodities v Dube*, 534 A2d 1298 (Maine 1987) (commission dispute between real estate broker and vendors; "[b]ecause by statute the Main Real Estate Commission extensively regulates brokers' activities, including the execution of exclusive listing agreements, such activities fall outside the scope of Maine's Unfair Trade practices Act and Consumer Solicitation Sales Act"); *Little v Gillette*, 218 Neb 271; 354 NW2d 147 (1984) (dispute over sale of fast food franchise by banker and real estate broker; "the exemption provision...is clearly stated and is applicable in the instant case. The bank is regulated by the Nebraska Department of Banking and Finance. Gateway is regulated by the Nebraska State Real Estate Commission. It is obvious that appellee's invitation [to impose Consumer Protection Act liability] was directed to the wrong branch of

(Continued on next page.)

Protection Act, the Deceptive Trade Practices Act, contains a substantially similar exemption to the Michigan Consumer Protection Act Exemption at issue here:

> Exemptions. Nothing in this chapter shall apply to actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States.

GL 1956 § 6-13.1-4. In *State v Piedmont Funding Corp*, 119 RI 695, 698-699; 382 A2d 819 (1978), the Rhode Island Supreme Court was called upon to decide nearly the identical issue that this Court faced in *Smith*:

> The question before this court is whether the activities of defendants [of selling insurance and investment programs] were "permitted" by state and federal agencies as that term is used in section 4 of the Act and, therefore, exempt from the provisions of the Act. The plaintiff contends that section 4 does not exempt a business activity from the mandate of the Act simply because it is subject to government regulation unless the regulating agency has established that the manner in which the transaction was conducted was a proper way of doing business.

Just as in *Smith*, the Court rejected this analysis, opting instead for a broad interpretation of the exemption: "the Legislature clearly exempted from the Act all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers." *Id.* at 699. The Court's decision in *Piedmont* was recently reaffirmed in *Lynch v Conley*, 853 A2d 1212 (RI, 2004) (applying the statutory exemption of the Deceptive Trade Practices Act to lead paint disclosure in connection with the sale of residential real estate).

(Continued from previous page.)

> government"); and *Irwin Rogers Ins Agency, Inc v Murphy*, 122 Idaho 270; 833 P2d 128, 134 (1992) (sale of insurance regulated by state agency, barring consumer protection claim).

Reply Brief of Defendant-Appellant at 8 (n 4), *Hartman v Dailey*, No. 129733 (Mich, August 18, 2006).

Similarly, in *Averill v Cox*, 145 NH 328, 332; 761 A2d 1083 (2000), the Supreme Court of New Hampshire overruled prior precedent which narrowly construed a statutory exemption provision of its Consumer Protection Act,[2] returning instead to a broad interpretation. *Id.* at 332.

Perhaps nowhere has this issue been more heavily debated than in the recent Illinois case *Price v Philip Morris, Inc*, 219 Ill 2d 182; 848 NE2d 1 (2005). In this class action suit, the Illinois Supreme Court was called upon to determine whether Philip Morris' sales and marketing of "light" and "lower tar and nicotine" cigarettes were outside the scope of Illinois' consumer protection law. Defendants claimed that section 10b(1) of the Illinois' Consumer Fraud Act (employing language nearly identical to the MCPA Exemption), barred the suit:

> Nothing in this Act shall apply to any of the following:
>
> (1) Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.

815 ILCS 505/10b(1). The Illinois Supreme Court, overturning a $10.1 billion award against defendant Philip Morris, ruled that Philip Morris was exempt from the Consumer Fraud Act because its sales and marketing were "authorized" by the Federal Trade Commission:

> Our reading of the plain and ordinary meaning of the language of section 10b(1) is consistent with apparent legislative intent and with the public policy embodied in the Consumer Fraud Act. Although the Consumer Fraud Act is to be liberally construed to effectuate its purposes of protecting "consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices" (*Robinson*, 201 Ill.2d at 416-17, 266 Ill. Dec. 879, 775 N.E.2d 951), the Legislature clearly intended for certain actions or transactions engaged in by entities otherwise subject to the Consumer Fraud Act to be exempt from liability under the Consumer Fraud Act and the Deceptive Practices Act, without regard to the possible merits of the asserted claim.
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> Section 10b(1) reflects a legislative policy of deference to the authority granted by Congress or the General Assembly to federal and state regulatory agencies and a

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[2]New Hampshire's Consumer Protection Act excludes "[t]rade or commerce otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of this state or of the United States." RSA 358-A:3, I.

> recognition of the need for regulated actors to be able to rely on the directions received from such agencies without risk that such reliance may expose them to tort liability.
>
> Further, section 10b(1), by exempting certain conduct from liability even if the conduct itself is objectionable, serves to channel objections to agency policy and practice into the political process rather than into the courts. See *City of Chicago v Beretta U.S.A. Corp.*, 213 Ill.2d 351, 432, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004) (suggesting that change in law affecting highly regulated industry be left to the legislature and the political process); *Charles v Seigfried,* 165 Ill.2d 482, 493, 209 Ill.Dec. 226, 651 N.E.2d 154 (1995) (noting that public and social policy should emanate from the legislature). Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators and may use the political process, including the power of the ballot box, if their voices are not heard.
>
> We conclude that neither the language of section 10b(1) nor the public policy of the State of Illinois, as expressed by the legislature, requires that a regulatory agency engage in formal rulemaking before it can specifically authorize conduct by the entities over which it has regulatory authority.

Price, supra at 244-245. Consistent with *Smith*, the *Price* court construed the exemption to exclude conduct or transactions subject to regulation notwithstanding the questionable nature of the conduct giving rise to the suit. *Id.*

The *Smith* Court's interpretation of the MCPA Exemption is neither illogical nor unprecedented; many states have liberally interpreted identical or comparable statutory provision in the same manner. The processes employed by these courts in arriving at this conclusion is supported by the purpose and plain language of the textual provisions. Any argument by appellees to the contrary should therefore be rejected by this Court.

Appellees contend that the legislative history of the MCPA supports the reversal of *Smith* (Brief of Appellees, p 20). However, the only "legislative history" cited in their argument is an

opinion piece authored by former Assistant Attorney General Edwin M. Bladen[3] well over twenty years after the Michigan Consumer Protection Act was passed, and six years after this Court's decision in *Smith*. Bladen points to nothing in the legislative record—no floor debates, no committee reports, and no proposed versions of the Act—to support his contention that the exemptions were to be very limited and the act to be broadly construed. Bladen, *supra* at 12. A thorough search of the legislative history of the Michigan Consumer Protection Act reveals the absence of any discussion by either the House or Senate Committee advocating a narrow reading of the Exemption.[4] Rather, he cites other statutes,[5] cases,[6] and the like on which the Michigan Legislature allegedly "relied" when fashioning the MCPA. Not surprisingly, there is no mention of these in the legislative record either. The absence of any reference to these in the official legislative record undermines any basis for seeing them as authoritative and raises the possibility that the article amounts to an effort to retroactively manufacture legislative history to advance the author's anti-*Smith* sentiment.

Moreover, even if this Court were to find relevant legislative history, its use to determine the proper interpretation of the MCPA is questionable at best. Historically, the use of legislative history in our judicial system has been disfavored; the traditional English/American practice was letting the final words of the statutes themselves reflect the legislative intent:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress

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[3]See Bladen, How and Why the Consumer Protection Act Came to Be, http://www.michbar.org/consumer/articles.cfm.

[4]Undoubtedly, had such records existed, Bladen would have so included them in his article.

[5]The Federal Lanham Act, 15 USC § 1125(a); the Ohio Consumer Sales Practices Act, Ohio Revised Code §§ 1345.01 - 1345.13.

[6]*Bigelow v Virginia*, 421 US 809, 95 S Ct 222; 44 L Ed 2d 600 (1975); *Sullivan v Ulrich*, 326 Mich 218; 40 NW2d 126 (1949).

> in the debate which took place on its passage, nor the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 30 (Princeton University Press, 1997), quoting *Aldridge v Williams*, 44 US (3 How) 9, 24 (1845). This was the prevailing view until the present century. *Scalia, supra* at 30. Frustrated by judges' invention of canons to impose their own views, in the late 1920-1930s the movement shifted towards using the legislative history to prevent the manipulation of legislative intent. *Id.*

The prevalent use of legislative history in statutory interpretation dates back only to the 1940s. *Id.* This practice has since been criticized by various Supreme Court justices, including Justices Frankfurter, Scalia, and Jackson. In fact, Justice Jackson vocalized his warning against this practice:

> I should concur in this result more readily if the court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

Scalia, supra, at 30-31, quoting *US v Public Utils Comm'n of Cal*, 345 US 295, 319; 73 S Ct 706; 97 L Ed 2d 1020 (1953) (Jackson, J., concurring).

In conjunction with these warnings of the potential misuses and manipulations of legislative history in statutory interpretation, it is this Court's duty to examine the conditions surrounding any such legislative history in order to shed light upon its reliability. What this "history" reveals is the following: 1) Bladen's article was authored in 2005, almost thirty years after the MCPA was enacted; 2) his article is written in an anti-*Smith* manner; and 3) Bladen is a

current Council Member for the State Bar of Michigan Consumer Law Section, a strong advocate of overruling or limiting the *Smith* decision.[7] Coupling these facts with the potential misuses of legislative history as cited above, Bladen's article affords no help for this Court in interpreting the exemption.

Appellees contend that the remedial nature of the MCPA mandates adherence to the corresponding canon of statutory construction, which suggests that remedial statutes should be liberally construed to achieve their intended goals. (Appellees Brief on Appeal, p 14). But the law is well settled that the remedial canon of construction is inapplicable where the statutory language is clear:

> A rule often stated is that a remedial statute should be construed liberally for the advancement of the remedy; but neither this rule nor the one of strict construction is a warrant for disregarding the language of a statute, or for amending the law to conform to a judicial conception of what should have been the legislative conception in passing it.

City of Detroit v Detroit United Railway, 156 Mich 106, 111; 120 NW 600 (1909). The language of the Michigan Consumer Protection Act exemption is not ambiguous. Disagreement regarding statutory language does not equal ambiguity: "a mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of America National Trust & Savings Ass'n v 203 North LaSalle Street Partnership*, 526 US 434, 461; 119 S Ct 1411; 143 L Ed 2d 607 (1999) (Thomas, J., concurring).

The canons of construction are to be dismissed when they work not to dissolve, but to create, create ambiguity:

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[7]In the Spring 2005 State Bar of Michigan Consumer Law Section Newsletter, Vol. 9, No. 3, Dani K. Liblang, Chair of the Consumer Law Section, stated the following:

> One of the most difficult and important challenges we face this year is working to fix the Supreme Court's misinterpretation of the exemption provisions of the Michigan Consumer Protection Act in *Smith v Globe Insurance Co.*

Id. at 2.

> Moreover, rules of statutory construction are to be invoked as aids to the ascertainment of meaning or application of words otherwise obscure or doubtful. They have no place, as this court has many times held, except in the domain of ambiguity....they may not be used to create but only to remove doubt. Moreover, in cases of ambiguity the rule here relied upon is not exclusive.

Russell Motor Car Co v Anderson Mfg Co, 261 US 514, 519; 43 S Ct 428 (1923).

This reading does not render licensed residential builders absolutely protected from a Michigan Consumer Protection Act suit. (Appellee's Brief, p 28). Transactions or conduct that is regulated by the Occupational Code cannot form the basis of the suit. MCL 339.101, *et seq*. But, there are conceivable instances where the conduct of a licensed residential builder might not fall within the purview of the Michigan Consumer Protection Act exemption. If the general transaction or conduct that the builder is engaged in is not regulated by the Occupational Code, not even the *Smith* interpretation will protect him. *Smith, supra* at 465. The Occupational Code and the Michigan Consumer Protection Act work in conjunction with one another, the former regulating the conduct of licensed residential builders and providing an avenue for violations, and the latter "catching" the unlicensed builder and allowing consumers to bring a Michigan Consumer Protection Act suit where the remedy of the Occupational Code is not available. Gregory J. Gamalski, Rights and Privileges of Builder Licensees Under Article 24 of the Occupational Code, MICHIGAN REAL PROPERTY REVIEW, Summer 2006, at 103.

B. PAST PRECEDENT FROM THIS COURT SUPPORTS THIS READING OF THE EXEMPTION.

In *Attorney General v Diamond Mortgage*, 414 Mich 603; 327 NW2d 805 (1982), the Court was called upon to determine the proper interpretation of § 4(1)(a). In *Diamond*, the defendant mortgage company was sued under the Michigan Consumer Protection Act for charging usurious brokerage fees while advertising and offering loans. *Id.* at 607. The circuit court dismissed the action, finding that the defendant's real estate broker's license exempted it

from the statute.[8] *Id.* at 609. This Court disagreed that "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business." *Id.* at 617. In other words, because the defendant's general conduct—mortgage writing—was not specifically authorized by the real estate broker's license, the exemption did not apply, and the defendant was subject to liability under the Act. *Id.*

Three years later, in 1985, the Court of Appeals was called upon, in *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985), to determine the applicability of the exemption, this time in the context of the insurance industry. In *Kekel*, the plaintiffs' insured brought an Michigan Consumer Protection Act suit against Allstate Insurance Company regarding a no-fault insurance contract. *Id.* at 381. The plaintiffs cited *Diamond* in support of their argument that the insurer was not exempt from the Act. *Id.* at 383. But the court rejected the plaintiffs' argument, finding that the exemption barred the suit:

> *Diamond* is distinguishable from the case at bar. The activities of the defendant in *Diamond* which the plaintiffs were complaining of were not subject to any regulation under the real estate broker's license of the defendant and thus such conduct was not reviewable by the applicable licensing or regulatory authority. That is not true in this case. Allstate Insurance Company is subject to all of the provisions of the Insurance Code of 1956 including the Uniform Trade Practices of the Insurance Code.

Id. at 384. The court in *Kekel* therefore interpreted the exemption to extend across regulated industries by focusing not on the general conduct at issue, as *Diamond* had done, but rather on the nature of the industry in which the conduct had taken place and whether that industry was subject to regulation.

In 1999 this Court clarified the interpretation of the exemption. In *Smith v Globe Life Ins*, 460 Mich 446; 597 NW2d 28 (1999), the Court was asked to determine the applicability of the exemption in the insurance context. The plaintiff sued an insurance company after it

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[8]The Court of Appeals affirmed on other grounds. *Id.*

allegedly denied in bad faith plaintiff's claim for benefits under a credit life insurance policy purchased by the plaintiff's decedent. *Id.* at 451. In concluding that the exemption applied, Justice Young, writing for the majority, found *Diamond* controlling:

> In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.' Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not "specifically authorized" under the defendant's real estate license.

Id. at 464. Consistent with *Diamond's* analysis, the *Smith* court rejected the *Kekel* court's focus on the regulation of the entire industry, placing the focus instead on the general transaction at issue:

> ...we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

This Court therefore concluded that because the defendant's general transaction—the sale of credit life insurance—was specifically authorized under the Insurance Code, the exemption applied. *Id.* at 466.

Diamond and *Smith* do not support different readings of the exemption. *Diamond* interpreted the exemption the same way that *Smith* did—by focusing on whether the generic conduct is authorized. The outcome differed not because the specific alleged misconduct in *Diamond*—receiving usurious brokerage fees—was not specifically authorized by law, but because the general conduct—mortgage writing—was not specifically authorized under the real estate broker's license: "[f]or this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business." *Diamond, supra* at 617. Arguably, had the defendant in *Diamond* held a mortgage license, the court would have found the exemption applicable.

This reading makes sense. Contrary to the plaintiffs' argument, as this Court recognized in *Smith* and *Diamond*, the Legislature "did not intend to exempt illegal conduct." 460 Mich at 453 citing *Diamond*, 414 Mich 603 (1982). Likewise, the argument that the exemption applies only to the insurance industry or similarly highly-regulated businesses is without any textual support. Nowhere in the language of the Michigan Consumer Protection Act did the Legislature make a distinction based on the amount of industry regulation. The term "pervasively regulated" cannot be found in the act. The Legislature's silence on this point is conclusive.

C. OVERRULING *HARTMAN* DOES NOT OFFEND AGAINST THE DICTATES OF STARE DECISIS.

Recently, *Hartman v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005), extended the Michigan Consumer Protection Act to the conduct of residential builders, on the basis that it was bound under stare decisis by *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000). But *Forton v Laszar* did not decide whether the Michigan Consumer Protection Act applies to the conduct of residential builders. Rather, the case stands for but one proposition—that the Act's definition of "trade or commerce" encompasses residential builders. *Id.* at 715. In *Forton*, the plaintiffs executed a written contract with defendant, a licensed residential builder, for the construction of a residential home. *Id.* at 712. Upon recognition of the home's structural inadequacies, the plaintiffs sued the defendant under the MCPA,[9] alleging two violations: 1) failure to complete the contract in a "good and workmanlike manner," and 2) defendant's deviation from the blueprints without the plaintiffs' approval. *Id.* at 714. The defendant questioned whether a residential builder could be sued under the Michigan Consumer Protection Act. *Id.* at 714. The Court of Appeals focused on a Michigan Consumer Protection Act's broad definition of "trade or commerce" in MCL 445.902(d) to support its conclusion that residential

[9]A breach of contract claim was also filed.

builders were engaging in trade or commerce when constructing a home and were therefore subject to liability under the Act. *Id.* at 715. Nowhere in the opinion was MCL 445.904(1)(a) mentioned or applied to the conduct of residential builders. The builder made no reference to *Smith* in support of his argument, and therefore the Court of Appeals did not address the issue.

The defendant thereafter made a futile attempt to raise the exemption on a motion for reconsideration. Justice Corrigan, concurring in the denial of application for leave to appeal, stressed that the defendant had failed to argue MCL 445.904(1)(a) and *Smith*:

> In a motion for rehearing in the Court of Appeals, defendant argued *for the first time* [emphasis by the Court] that his sale of the house to plaintiffs was exempted from MCPA regulation under subsection 4(1)(a) of the MCPA. The Court of Appeals denied defendant's motion for rehearing without providing any specific explanation....
>
> ...Defendant now contends that his sale to plaintiffs come within [the regulated activity] exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code... In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders and Maintenance and Alteration Contractors' Board.
>
> Although defendant's legal argument appears to have substantive merit, it can be of no avail to defendant, who failed to raise the issue in a timely fashion. Subsection 4(3) of the MCPA provides that "[t]he burden of proving an exemption from this act is upon the person claiming the exemption." Defendant clearly failed to meet this burden by claiming the exemption for the first time in a motion for rehearing in the Court of Appeals. 463 Mich 969, 622 NW2d 61 (2001).

Forton did not decide whether the exemption applies to residential builders; the Court of Appeals neither addressed or determined the issue. *Forton* simply stands for the proposition that the

conduct of residential builders fits within the definition of "trade or commerce under MCL 445 903(1). 239 Mich App 715.

The post-*Forton* cases *Winans v Marlene, Inc*, 2003 WL 21540437 (Mich App, 2003), and *Shinney v Cambridge Homes, Inc*, 2005 WL 415492 (Mich App, 2005) correctly interpreted *Forton's* limited holding. In *Winans*, the plaintiffs sued the defendant subcontractor under the MCPA when it had been determined that the defendant's improper excavation resulted in severe flooding to plaintiffs' basement. 2003 WL 21540437 at 1. In *Shinney*, the defendants were similarly sued under the MCPA when they failed to include information in a disclosure statement on a purchase agreement. 2005 WL 415492 at 1.

In both cases, the Court of Appeals held that the exemption applied to licensed residential builders and dismissed the MCPA suits, correctly interpreting *Forton* to stand for the proposition that "trade or commerce" encompasses residential builders. Moreover, in both cases the Court of Appeals applied *Smith*'s reading of subsection 4(1)(a) to determine that because the generic transactions at issue here were specifically authorized under state laws, the residential builders were exempt.

The confusion came about in *Hartman v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005). In *Hartman*, the homeowners entered into an agreement with a building company to have their home renovated. *Id.* at 547. When the homeowners became dissatisfied with the quality of the work performed and withheld payment due under the existing contract, the builder filed a complaint against the homeowners. *Id.* at 548. In response, the homeowners filed a counter-complaint, including a claim under the Michigan Consumer Protection Act. *Id.* On appeal, the builder, Hartman, raised the issue of whether the statute applies to building contractors. *Id.* at 550.

The Court of Appeals agreed with this Court's interpretation of the exemption as set0 forth in *Smith*, stating that that had it been free to rule on its own cognizance, it would not have applied the Act to residential builders because the general conduct in which the defendants engaged—renovating a home—was "specifically authorized" under the Occupational Code:

> We declare a conflict with *Forton*, and, if we were not bound by this precedent, we would hold that the MCPA does not apply to the performance of residential construction, renovation, or repair by licensed residential builders.

Id. at 547. Not attempting to hide its dissatisfaction, the Court of Appeals stated that it was bound under MCR 7.215(J)(1) by the court's earlier decision in *Forton*, and reluctantly held that the Act applies to residential construction, renovation or repairs by licensed residential builders. *Id.*

This history makes clear that overruling *Hartman* does not offend against the dictates of stare decisis. *Hartman* was itself enacted over strong reluctance by author Justice O'Connell. Writing for the majority, he reiterated that MCR 7.215(J)(1) provided the sole rationale for the Court's conclusion. 266 Mich 547. Within a string of cases, Judges Schuette, Sawyer, O'Connell, Donofrio, Kelly, Saad, and Smolenski—seven out of eight judges of the Court of Appeals—have all agreed that licensed residential builders are exempt from an Michigan Consumer Protection Act suit when their general conduct or transaction is specifically authorized and regulated by the Michigan Occupational Code. (Brief of Defendants-Appellants, p 13). *Liss v Lewiston-Richards, Inc & Jason Lewiston*, No. 03-046587-CK (Oakland County Circuit Court 2006).

This Court has recognized that it is duty-bound to re-examine a precedent where its reasoning is fairly called into question. *Robinson*, 462 Mich at 464. It must do so by first examining whether the earlier decision was wrongly decided. 462 Mich at 462. If so, it then evaluates whether it is appropriate to overrule the decision by examining "the effects of

overruling it, including most importantly the effect on reliance interests and whether that overruling would work an undue hardship because of that reliance." 462 Mich at 466. Justice Corrigan taught that an important factor in this evaluation is whether the past decision "would perpetuate an unacceptable abuse of judicial power." 462 Mich at 473. When a past decision has "usurp[ed] power properly belonging to the legislative branch," overruling it "does not threaten legitimacy.... [I]t restores legitimacy." 462 Mich at 473. When, "under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." 462 Mich at 474. In those circumstances a reversal is warranted in order to "restore judicial legitimacy by overruling decisions that wrongly usurped the power of the Legislature." 462 Mich at 474.

In *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), the United States Supreme Court examined a series of policy factors that comprise the doctrine of stare decisis. Those included the questions of "(1) the "workability" of a prior case or line of cases; (2) the protection of reasonable reliance interests; (3) the erosion of the doctrine's foundations by subsequent decisions; (4) changed factual circumstances; and (5) the need to preserve public impressions of judicial integrity...." Michael Stokes Paulsen, *Abrogating stare decisis by statute: May congress remove the precedential effect of Roe and Casey?*, 109 Yale L J 1535, 1551 (2000). This Court has embraced a similar analysis when evaluating past precedent. *Robinson*, 462 Mich 439, 464 (citing *Casey* with approval). See also *People v Kazmierczak*, 461 Mich 411, 424-425; 605 NW2d 667 (2000) and *Nawrocki v Macomb County Road Comm*, 463 Mich 143; 615 NW2d 702 (2000). Analysis of these factors supports the builders' position.

The inquiry into workability is "essentially a question of whether the Court believes itself able to continue working within the framework established by a prior opinion." Michael Stokes Paulsen, 109 Yale L J at 1552. That consideration, when applied to the judicially-created

application of the MCPA to residential builders, compels the conclusion that a reversal is in order. The failure to overturn *Hartman* will leave in place an unintended and expansive interpretation of the MCPA, and one that effectively eliminates the major statutory exemption provision crafted by the Michigan Legislature. The practical workability of such an approach is more than questionable—it is impossible. *Hartman* cannot be reconciled with *Smith* or *Diamond*. Equally important, *Hartman* creates the potential for needless friction between separate branches of government, each enforcing regulatory schemes governing the same conduct or transactions, by allowing for judicial enforcement of the Michigan Consumer Protection Act of claims based on conduct or transactions that are authorized under laws of the state and administered by a regulatory body. Such an approach is unworkable.

No reliance interests would support a decision retaining *Hartman's* holding applying the MCPA to residential builders. *Id.* And this Court has recently taught, when considering the reliance interest, "it is to the words of the statute itself that a citizen first looks for guidance in directing his action." *Robinson*, 462 Mich at 468. A court should not "confound those legitimate citizen expectations by misreading or misconstruing a statute" because to do so will disrupt the reliance interest. If a past court has misread or misconstrued a statute, the "subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* Speaking for the Court, Justice Taylor explained that the court's distortion of the statute amounts to a "judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives." *Id.* Because of this, an error "can gain no higher pedigree as later courts repeat the error." *Id.*

Finally, the need to preserve public impressions of judicial integrity supports a reversal. This Court has uniformly adopted and applied a text-based approach to statutory interpretation. See e.g. *Nawrocki, supra*, *Robinson, supra*, *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). It has done so consistent with its view that this approach constitutes the faithful application of well-defined legal principles - not the predisposition of individual judges. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). Having repeatedly held that a court is "most justified in overruling an earlier case if the prior court misconstrued a statute," this Court should now faithfully apply that rule here. In doing so, a reversal is required.

This Court has rejected the legislative acquiescence rule that formerly supported the maintenance of erroneous prior judicial decisions. *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998); and *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999). That rejection makes sense and it also supports the builder's position here. Treating an erroneous statutory interpretation as binding or affording it strong stare decisis weight might make sense if the legislature were perpetual. But it is not. Today's legislature may "leave in place an interpretation of a law simply because today's coalitions are different. The failure of a different body to act hardly shows that the interpretation of what an earlier one did is 'right.'" Frank H Easterbrook, *Stability and reliability in judicial decisions*, 73 Cornell L R 422, 427 (1988). When a decision is founded upon plain error, refusing to follow it "cannot be fairly criticized as illegitimate." John Paul Stevens, *The life span of a judge-made rule*, 58 NYU L R 1, 4 (1983).

Jonathon Swift's satire of the doctrine of stare decisis, reminds us to carefully consider and correct error if there is a cogent reason for doing so:

> It is a maxim among ... lawyers, that whatever had been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.

> These, under the name of precedents, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.

Swift, *Gulliver's Travels* (Dodd Mead ed, 1950), p 256. But this Court correctly has refused to continue to decide cases in accord with plain error based on a disregard of the language of the statute; instead, it has embarked upon a course of action directed towards restoring deference to the text of statutes that it interprets. As Justice Frankfurter said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Boys Markets v Retail Clerks*, 398 US 235, 255; 90 S Ct 1583; 26 L Ed 2d 199 (1970), quoting *Henslee v Union Planters Bank*, 335 US 595, 600; 69 S Ct 290, 293; 93 L Ed 2d 259 (1949) (Frankfurter, J, dissenting). The *Hartman* court impinged upon the Legislature's sphere of decision-making by limiting the applicability of a clear statutory exemption. Stare decisis neither commands nor supports the continued adherence to these precedents.

D. THIS COURT'S DECISION SHOULD BE GIVEN RETROACTIVE EFFECT AND APPLIED TO ALL PENDING AND FUTURE CASES.

At the outset, it is important to reiterate the general rule. Statutory decisions apply retroactively; that is, a judicial decision explaining the meaning of a statute applies from the effective date of the statute. That notion finds its roots in Blackstone who explains that the duty of the court is not to "pronounce new law, but to maintain and expound the old one," *Linkletter v Walker*, 381 US 618, 622-623; 85 S Ct 1731; 14 L Ed 2d 60 (1965) (quoting 1 W Blackstone, Commentaries *69). This is consistent with the principle that a judge's function is not to legislate but to explain the meaning of legislation enacted by a legislative body. Even when overruling prior precedent, the new decision is "an application of what is, and therefore had been, the true law', *Linkletter*, 381 US at 623 (citing Shulman, *Retroactive Legislation*, in 13 Encyclopedia of the Social Sciences [1934], 355, 356). One state court justice explained the thinking behind the rule:

> I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the legal decision, and that the former decision was not, and never had been the law, and is overruled for that very reason.

Gelpcke v City of Dubuque, 68 US (1 Wall) 175, 211 (1863) (Miller, J., dissenting).

Former Supreme Court Justice Harlan also spoke to the need for a court to adhere to the rule of retroactivity. He explained in one early decision that picking and choosing between similarly situated litigants those who alone will receive the benefit of a "new" rule of law offends against our basic judicial tradition. *Desist v United States*, 394 US 244, 256; 89 S Ct 1030; 22 L Ed 2d (1969) (Harlan, J. dissent). In Harlan's view, matters of principle were at stake that required the retroactive application of precedent. Harlan also deplored the doctrinal confusion that, to his view, stems from creating exceptions to the retroactive doctrine. 394 US at 258.

In more recent times, Justice Scalia and others have lambasted the judiciary for usurping legislative powers by toying with retroactivity. By way of example, Justice Scalia took the position that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be," *American Trucking Ass'n v Smith*, 496 US 167, 200; 110 S Ct 2323; 110 L Ed 2d 145 (1990) (Scalia, J., concurring). According to Scalia, applying decisions prospectively "is contrary to that understanding of 'the judicial power' which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, the very exercise of power asserted in [this case]." *Id.* at 201. See also Bradley Scott Shannon, *The retroactive and prospective application of judicial decisions*, 26 Harv J of Law & Public Policy 811 (2003).

In his concurring opinion in *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993), Justice Scalia cautioned courts against the practice of tinkering with retroactivity as such behavior may well violate significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easer to overrule prior precedent.

509 US at 105, 113 S Ct at 2522. In addition, Justice Scalia warned that the "true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.*, citing *James B. Beam Distilling Co v Georgia*, 501 US 529, 534; 111 S Ct 2439, 2443; 115 L Ed 2d 481 (1991) and other cases.

These principles apply with equal strength under Michigan law. Each time the Court arrogates to itself the power to legislate, it harms the administration of justice. Decisions that tinker with full retroactivity of a statute, in essence, amount to the judicial rewriting of the statute's effective date. By establishing a new effective date, the Court encroaches upon the Legislature's sphere of authority. Indeed, such a ruling may be seen as a violation of the Separation of Powers clause of the Michigan Constitution, which divides the powers of government into three branches and which bars one branch from exercising powers properly belonging to the other. Const 1963, art 3, § 2. If prospective application of the law might conceivably be justified when addressing a change in the common law (an area within the judiciary's unique purview) or when dealing with vested property rights or when imposing a new duty or obligation, no such rationale applies here. Any decision limiting the retroactive effect of this decision amounts to a usurpation of legislative prerogative to establish the limitation date for bringing claims. Instead, full retroactivity should apply.

The selective application of the ruling is also barred because it violates the principle of treating similarly situated persons the same. *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). In a concurring opinion, Justice Scalia cautioned against the idea that a court can tinker with retroactivity without violating significant judicial norms:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.

509 US at 105; 113 S Ct at 2522. Not surprisingly in light of this backdrop, Michigan courts have traditionally given litigants who successfully obtain a reversal of prior precedent, always after much risky investment of time, energy, and expense, the benefit of the new rule. *Placek v Sterling Heights*, 405 Mich 638, 690-691; 275 NW2d 511 (1979) (Coleman, C.J. dissenting because the majority "seemingly automatically" considered the benefits of the decision "to be due the parties in the instant case."). This traditional retroactive application of judicial decisions in all civil cases on direct review stems from a proper understanding of the court's function, which is to decide litigated issues brought before them. Shannon, at 838-839. A full retroactivity approach would mean that the Court's holding would apply in any circumstance that it can be invoked under Michigan court rules.

This makes both practical and theoretical sense. According to commentators, "[p]rospective announcements of judge-made law raise both accuracy and legitimacy concerns." Shannon, at 849 quoting Michael C. Dorf, *Dicta and article III*, 142 U Pa L R 1997, 2000 (1994). Prospective decision making is difficult to predict, potentially denies the litigants of the benefit of a decision in their favor, and often leads to ambiguous results in practice because the determination of whether events occurred before or after the date of a precedent-setting opinion can be difficult to ascertain. And prospective decisionmaking tends to undermine public confidence in the judiciary because it injects uncertainty into the process, undermines the notion that courts say what the law is, and not what it should be, and allows for a highly subjective approach.

Despite the longstanding understanding of the judiciary's limited role, as noted above, Michigan courts (as well as other state courts) have created a limited exception. This Court has

occasionally restricted the effect of certain decisions that overrule past precedent. But it has done so in limited circumstances involving the overruling of uncontradicted, settled precedent whose resolution was not clearly foreshadowed (assuming a weighing of the three factors outlined above also warrants deviating from the general rule of full retroactivity). See, e.g., *Tebo v Havlik*; 418 Mich 350; 343 NW2d 181 (1984); *Sturak v Ozomaro*, 238 Mich App 549; 606 NW2d 411 (1999); *Lindsay v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). Whatever the merits of that approach in general, it is not suitable here.

Overruling the *Hartman* court's expansion of the MCPA to residential builders would not constitute "clearly establishing a new rule of law." *Hartman* itself represented usurpation of legislative action. This Court itself has flatly asserted that it has an obligation to correct such past abuses, an act which "restores legitimacy" to the system. *Robinson v Detroit*, 462 Mich 439, 472-473; 613 NW2d 307 (2000). And it did so without limiting the effect of its decision in *Robinson*. This central factor controls all other aspects of the three-factor *Linkletter* test embraced by this Court in *Pohutski*. The test: (1) the purpose of the "new" rule is to conform Michigan jurisprudence to the mandates of the Michigan Legislature; (2) there can have been no proper or legitimate reliance on a judicially-created rule of law adopted in contravention of the clear and unambiguous statutory text; and (3) the effect of full retroactivity on the administration of justice will be to honor the commands and prohibitions of the Michigan legislation.

In *Pohutski*, this Court quoted *Robinson*'s teaching about retroactivity in the context of the prior misreading of a statute and explained:

> In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real- world dislocations." *Id.* at 466, 613 N.W.2d 307. Further, we must consider reliance in the context of erroneous statutory interpretation:
>
> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first

> looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-468; 613 NW2d 307.]
>
> Thus, while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power restores legitimacy.
>
> *Id.* at 472-473 (CORRIGAN, J., concurring)

Accordingly, this Court has recognized its obligation to honor the intent of the Legislature as reflected in the plain and unambiguous language of the statute. 465 Mich at 694-694. More recently, this Court characterized the retroactivity aspect of *Pohutski* as an extreme measure warranted only because of exigent circumstances. *County of Wayne v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004). The *Hathcock* court cautioned that there "is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Hathcock, supra* at 484 n 98. *Pohutski* was sui generis since it involved a history in which the Court had allowed recovery for trespass-nuisance claims against local governments that extended back to the 1800s. At the same time, after the *Pohutski* litigation began but before the Court issued its opinion, the Michigan Legislature created a new statutory cause of action. Thus, giving its decision retroactive effect would have, in the Court's view, carved out a tiny group of litigants who alone could not recover, when everyone before and after had the right to bring their claim. Critical to

the Court's analysis was its effort to be faithful to what it undoubtedly perceived as a legislative signal when a new statute creating a cause of action was given immediate effect while Pohutski was pending before the Court.

Whatever the merits of *Pohutski's* decision to limit its effectiveness to prospective-only, those considerations do not apply here. To the contrary, the MCPA exemption, which was intended to provide protection for regulated businesses by barring claims under the MCPA when the general conduct or transaction is authorized by law, should be given full effect. Doing so will be consistent with this Court's philosophy of effectuating legislative pronouncements and enactments.

When the Court judicially decides whether to apply a principle that must be seen as a correct statement of the law to only some cases rather than to all cases, it harms the administration of justice. It results in an uneven application of law violating the basic norm of appellate law that like cases be treated alike. A directive that the holding is to have prospective application fosters the error arising from earlier courts' mishandling of MCL 445.904(1)(a), a mishandling that severely undercuts the Michigan Legislature's explicit limitation of Michigan Consumer Protection Act claims. Limiting the effect of its holding would lend judicial endorsement to the *Hartman* court's mistaken interpretation of *Forton*. Sound jurisprudential principles demand adherence to the general rule of full retroactivity. Only under such an approach will the Court be vindicating the statutory provision intended to exempt from the Act generic conduct or transactions that are authorized by laws and already subject to regulation and enforcement.

RELIEF

WHEREFORE, Amicus Curiae Michigan Defense Trial Counsel respectfully requests this Court to limit the inquiry under MCL 445.904(1)(a) to whether the general transaction or conduct is specifically authorized by law as this Court held in *Smith v Globe Life Ins*, overrule *Hartman v Dailey* to the extent that it applies the Michigan Consumer Protection Act to residential builders and contractors, and give its decision full retroactive effect.

Respectfully submitted,

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